

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Mailed:
December 11, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Astilean

Serial No. 76674766

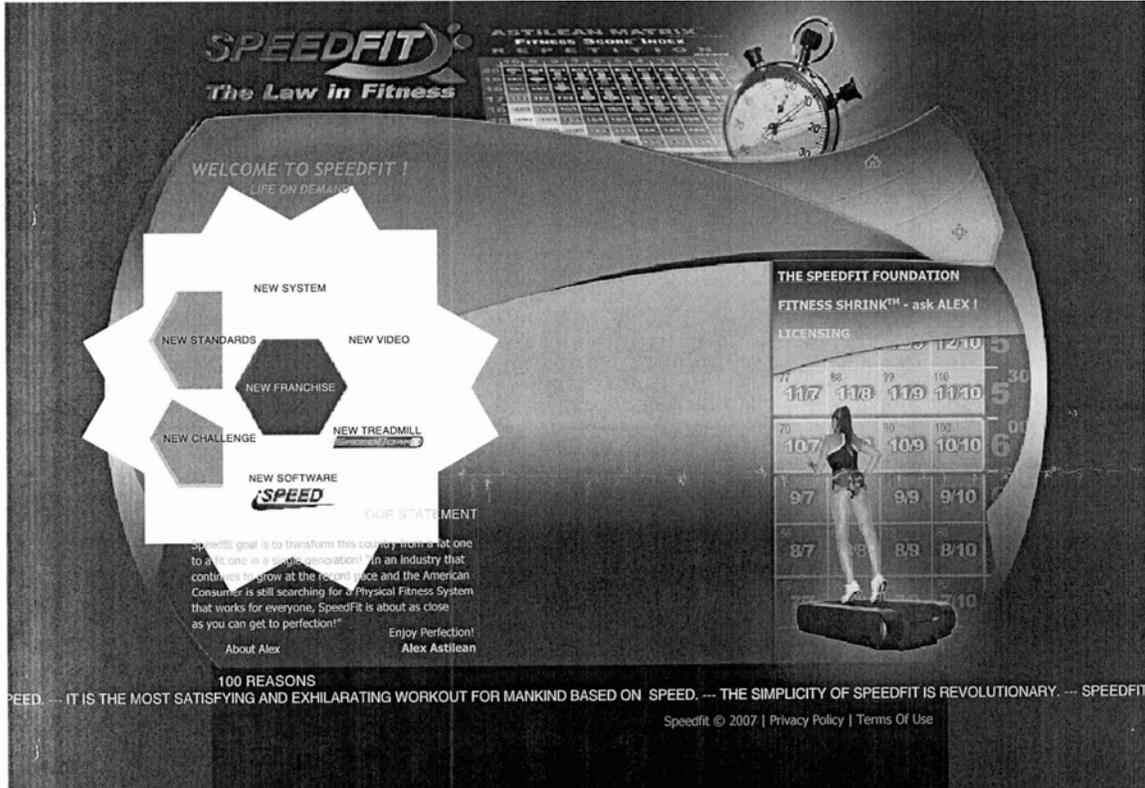
Myron Amer of Myron Amer, P.C. for Aurel A. Astilean.

Jason F. Turner, Trademark Examining Attorney, Law Office
108 (Andrew Lawrence, Managing Attorney).

Before Kuhlke, Mermelstein and Bergsman, Administrative
Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Aurel A. Astilean ("applicant") filed a use-based application for the term FITNESS SHRINK (in standard character format) for "health, fitness and exercise instruction; ongoing media programs in the nature of health, fitness and exercise instruction," in Class 41. (Emphasis added). Applicant submitted the webpage shown below as his specimen of use.



The Examining Attorney refused registration on two grounds:

1. Applicant's failure to comply with the final requirement to specify the field in which applicant renders his television programming services; and,
2. The specimen does not show applicant's mark used to identify applicant's health club services or television programs.

¹ Although it does not show up clearly in the copy of applicant's webpage reproduced in this decision, the terms "The Speedfit Foundation," "Fitness Shrink™ - ask Alex!," and "Licensing" are underlined in the manner of a link.

A. Whether the description of services is acceptable?

As indicated above, applicant originally identified his services as "health, fitness and exercise instruction; ongoing media programs in the nature of health, fitness and exercise instruction," in Class 41. (Emphasis added).

Pursuant to a recommendation by the Examining Attorney, applicant amended the identification of services to read as follows:

Health club services, namely providing instruction and equipment in the field of physical exercise; entertainment in the nature of on-going television programs via television, satellite, film, audio, video, internet, and 3-D virtual reality media.

Upon realizing that the amended identification of services was not limited to the field of health, fitness and exercise instruction, the Examining Attorney required applicant to amend his description of services to insert the field in which the services were rendered.

Accordingly, the Examining Attorney required applicant to amend the identification of services to read as follows:

Health club services, namely providing instruction and equipment in the field of physical exercise; entertainment in the nature of on-going television programs via television, satellite, film, audio, video, internet, and 3-D virtual reality media in the field of health, fitness and exercise instruction.

(Emphasis added).

Despite having originally limited his ongoing media programs to the field of health, fitness and exercise instruction, applicant refused to so limit the amended identification of services for the reasons set forth below:

It is applicant's contrary contention however, that the subject matter of the programs is "health, fitness and exercise" which follows "in the nature of."

It is respectfully requested that the Board take official notice of the RANDOMHOUSE WEBSTER'S College Dictionary in which the word "nature" is defined as "the particular combination of qualities belonging to a . . . thing." Thus, "health, fitness and exercise" is the subject matter of the "programs" and therefore the Trademark Examining Attorney's contention that the recitation of the services lacks specificity of the television programs is without merit.²

Trademark Rule 2.71(a) provides that "[t]he applicant may amend the application to clarify or limit, but not to broaden, the description of goods and/or services." See also *In re Swen Sonic Corp.*, 21 USPQ2d 1794 (TTAB 1991); *In re M.V. Et Associes*, 21 USPQ2d 1628 (Comm'r Pats. 1991). Here applicant's amendment to

entertainment in the nature of on-going television programs via television,

² Applicant's June 9, 2008 Brief, p. 2.

Serial No. 76674766

satellite, film, audio, video,
internet, and 3-D virtual reality media

from

ongoing media programs in the nature of
health, fitness and exercise
instruction

clearly exceeds the scope of the original identification of services because the amended identification of services is not limited to the field of health, fitness and exercise instruction.

Accordingly, the refusal to register applicant's mark because the proposed amendment to the identification of services impermissibly broadens the scope of the identification of services is affirmed.

B. Whether applicant's specimen is acceptable?

An applicant for registration must submit a specimen showing the mark as used in commerce. Section 1(a) of the Trademark Act of 1946, 15 U.S.C. 1052(a); Trademark Rule 2.34(a)(1)(iv), 37 CFR §2.34(a)(1)(iv). A service mark specimen "must show the mark as actually used in the sale or advertising of the services." Trademark Rule 2.56(b)(2), 37 CFR §2.56(b)(2). A service mark specimen must show an association between the mark and the services for which registration is sought. *In re Adair*, 45 USPQ2d 1211, 1214 (TTAB 1997) (the mark must be used in such a

manner that it would be readily perceived as identifying the source of the services); TMEP §1301.04 (5th ed. 2007).

The Examining Attorney argues that the webpage does not display the term FITNESS SHRINK in connection with any identifiable services, let alone the health club services and television programming services for which registration is sought. On the other hand, applicant contends that there is a direct association between the mark and health club services because the webpage displays the mark in close proximity to an individual "engaged in an exercise routine on a treadmill, attired in shorts and a top, and apparently walking or running on the treadmill, all of which is known from common experience denotes a participation in 'HEALTH CLUB SERVICES.'" (Emphasis in the original).³

The issue before us is whether the term FITNESS SHRINK, as displayed in the webpage, is used as a service mark to identify health club services and/or television programming services.⁴ In determining whether FITNESS SHRINK is used as a service mark to identify health club

³ Applicant's February 7, 2008 Brief, p. 2.

⁴ While we have some doubts whether applicant even uses FITNESS SHRINK as a service mark, that issue is not before us.

Serial No. 76674766

services and/or television programming services, we must review the specimen (webpage) to determine whether consumers will associate FITNESS SHRINK with health club services and/or television programming services. *In re Moody's Investors Service Inc.*, 13 USPQ2d 2043 (TTAB 1989) ("Aaa," as used on the specimen, found to identify the applicant's ratings instead of its rating services); *In re McDonald's Corp.*, 229 USPQ 555 (TTAB 1985) (APPLE PIE TREE did not function as mark for restaurant services, where the specimen showed use of mark only to identify one character in a procession of characters, and the proposed mark was no more prominent than anything else on specimen); *Intermed Communications, Inc. v. Chaney*, 197 USPQ 501 (TTAB 1977) (business progress reports directed to potential investors do not show service mark use for medical services); *In re Reichhold Chemicals, Inc.*, 167 USPQ 376 (TTAB 1970) (technical bulletins and data sheets on which mark was used merely to advertise chemicals do not show use as a service mark for consulting services). Unfortunately, there is no evidence bearing on the reaction of the purchasing public to applicant's use of FITNESS SHRINK. Accordingly, we must rely on our own analysis of the webpage to determine whether consumers would perceive FITNESS SHRINK as a service mark identifying applicant's health club services

Serial No. 76674766

and/or television programming services. *In re The Signal Companies, Inc.*, 228 USPQ 956, 957 (TTAB 1986); *In re Wakefern Food Corp*, 222 USPQ 76, 77 (TTAB 1984).

The primary purpose of the webpage is to promote the SPEEDFIT fitness system. The information on the webpage states that SPEEDFIT, not FITNESS SHRINK, "is the most satisfying and exhilarating workout for mankind based on speed." It appears that SPEEDFIT is a workout system comprising a treadmill and associated software. Thus, the consumer's attention is focused on the SPEEDFIT system. The focus of the webpage on the SPEEDFIT system is important because the webpage is providing information about a fitness system, not health club services or television programming services. In fact, there are no references to health club services or television programming services on the webpage.

The term FITNESS SHRINK is displayed on the right-hand side of the webpage, above the woman on a treadmill, as one of three informational terms shown below.

THE SPEEDFIT FOUNDATION

FITNESS SHRINK™ - ask ALEX!

LICENSING

Because the informational terms are underlined, they are probably webpage hyperlinks connecting to another section

Serial No. 76674766

of applicant's website or another document that may or may not be part of applicant's website. Even assuming consumers perceive FITNESS SHRINK to be a service mark, it is not in any way associated with health club services or television programming services. As indicated above, there is no hint of a reference to health club services or television programming services displayed in the webpage. Based on the way in which FITNESS SHRINK is used, consumers might associate it with some sort of fitness consulting services.⁵

In view of the foregoing, we are of the opinion that the term FITNESS SHRINK, as used by applicant, does not identify and distinguish health club services or television programming services.

Decision: The refusal to register is affirmed.

⁵ Because the word "shrink" is slang for a psychiatrist or a psychoanalyst, consumers will see FITNESS SHRINK as identifying a fitness expert who may provide fitness consulting services. The Random House Dictionary of the English Language (Unabridged), p. 1773 (2nd ed. 1987). The Board may take judicial notice of dictionary evidence. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).